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 (Delaware)

FENWICK & WEST LLP
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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

17 ARIEL ABITTAN,

18 Plaintiff,

19 v.

20 LILY CHAO (A/K/A TIFFANY CHEN, A/K/A
 21 YUTING CHEN), DAMIEN DING (A/K/A
 DAMIEN LEUNG, A/K/A TAO DING),
 22 TEMUJIN LABS INC. (A DELAWARE
 CORPORATION), AND TEMUJIN LABS INC.
 (A CAYMAN CORPORATION),

23 Defendants,

24 and

25 EIAN LABS INC.,

26 Nominal Defendant.

Case No.: 5:20-cv-09340-NC

**[PROPOSED] ORDER GRANTING
 DEFENDANT TEMUJIN LABS INC.
 (DELAWARE)'S MOTION TO
 DISMISS COMPLAINT**

1 The motion of defendant Temujin Labs Inc. (Delaware) (“Temujin Delaware”) to dismiss
 2 plaintiff’s Complaint came on for hearing before the Court on May 19, 2021. The parties were
 3 represented by their respective counsel of record.

4 After considering the papers submitted by the parties and the arguments of counsel, the
 5 Court finds that:

- 6 1. Each of plaintiff’s claims against Temujin Delaware is subject to dismissal for
 7 failure to comply with California’s compulsory counterclaim statute. Each of
 8 plaintiff’s claims against Temujin Delaware “arises out of the same transaction,
 9 occurrence, or series of transactions or occurrences” as are at issue in the earlier
 10 filed case, *Temujin Labs Inc. v. Abittan et al.*, No. 20CV372622 (Cal. Sup. Ct.
 11 Cnty. of Santa Clara) (filed Nov. 6, 2020). Cal. Code Civ. Proc. §§ 426.10(c);
 12 426.30(a); *see also In re Crown Vantage, Inc.*, 421 F.3d 963, 973 n.7 (9th Cir.
 13 2005) (“Federal courts will not permit an action to be maintained where the
 14 claims asserted should have been brought as a compulsory counterclaim in an
 15 earlier action.”) (citing *Cheiker v. Prudential Ins. Co.*, 820 2d. 334 (9th Cir.
 16 1987)).
- 17 2. Plaintiff’s derivative claims purportedly on behalf of Eian Labs Inc. (“Eian”)
 18 against Temujin Delaware fail because plaintiff has failed to adequately plead the
 19 statutory prerequisites of Federal Rule of Civil Procedure 23.1. Specifically, the
 20 Complaint is not verified and plaintiff fails to allege he was a shareholder of Eian.
- 21 3. Each of plaintiff’s claims against Temujin Delaware fails because plaintiff has
 22 failed to plead specific facts raising a reasonable inference that Temujin Delaware
 23 is liable for the misconduct alleged and instead impermissibly conflates Temujin
 24 Delaware with other defendants.
- 25 4. Plaintiff’s claims for violations of 18 U.S.C. §§ 1962(c) and (d) against Temujin
 26 Delaware fail because plaintiff has failed to plead facts, as opposed to conclusions,
 27 demonstrating each primary liability element with respect to Temujin Delaware
 28 with the required specificity, and absent well-pleaded primary liability, there can
 be no liability for conspiracy under § 1962(d).
5. Plaintiff’s claim for aiding and abetting breach of fiduciary duty against Temujin
 6 Delaware fails because plaintiff has failed to plead facts, as opposed to conclusions,
 7 stating a claim against Temujin Delaware. Further, plaintiff has failed to meet the
 8 heightened pleading standards of Federal Rule of Civil
 9 Procedure 9(b).
6. Plaintiff’s claim for fraudulent inducement against Temujin Delaware fails
 7 because plaintiff has failed to plead facts, as opposed to conclusions, stating a
 8 claim against Temujin Delaware. Further, plaintiff has failed to meet the
 9 heightened pleading standards of Federal Rule of Civil Procedure 9(b).
7. Plaintiff’s claim for fraud against Temujin Delaware fails because plaintiff has
 8 failed to plead facts, as opposed to conclusions, stating a claim against Temujin
 9 Delaware. Further, plaintiff has failed to meet the heightened pleading standards
 10 of Federal Rule of Civil Procedure 9(b).

- 1 8. Plaintiff's claims for conversion against Temujin Delaware fail because plaintiff
2 has failed to plead facts, as opposed to conclusions, demonstrating any conduct
3 whatsoever by Temujin Delaware with respect to the supposedly converted
4 property.
- 5 9. Plaintiff's claim for unjust enrichment against Temujin Delaware fails because
6 plaintiff has failed to plead an absence of justification for Eian's asset sale or any
7 other value transfer to Temujin Delaware, plaintiff has adequate remedies at law,
8 and under California law, "unjust enrichment is a theory of recovery, not an
9 independent legal claim." *Keirsey v. eBay, Inc.*, 2012 WL 12920765, at *2 (N.D.
10 Cal. Aug. 6, 2012).
- 11 10. Plaintiff is not entitled to an accounting from Temujin Delaware under Delaware
12 or California law because he has failed to state any viable primary claim against
13 Temujin Delaware, whether on behalf of Eian derivatively or against Temujin
14 Delaware directly, and plaintiff has not alleged facts indicating he is a shareholder
15 of Temujin Delaware such that it could owe him fiduciary duties.

16 Therefore, it is HEREBY ORDERED that: (1) Temujin Delaware's motion to dismiss
17 pursuant to California's compulsory counterclaim statute, Cal. Code Civ. Proc. § 426.30(a) is
18 GRANTED; and (2) Temujin Delaware's motion to dismiss pursuant to Federal Rule of Civil
19 Procedure 12(b)(6) is GRANTED; and the Complaint is DISMISSED WITH PREJUDICE.

20 **IT IS SO ORDERED.**

21 Dated: _____

22 The Honorable Nathanael Cousins
23 United States Magistrate Judge

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